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Mohd Saifulrizan bin Sainan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(M)-106-02 OF 2018
KAMARDIN HASHIM, RHODZARIAH BUJANG AND ZABIDIN DIAH JJCA
6 OCTOBER 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant convicted and sentenced to death for offence of murder — Whether prosecution had proven its case beyond reasonable doubt against appellant on the murder charge by only adducing circumstantial evidence — Whether appellant's statement to police officer within ambit of s 27 of the Evidence Act 1950 — Whether subsequent conduct admissible — Whether appellant's statement admissible — Whether appellant's wife evidence was not credible and should be disregarded in its entirety — Evidence Act 1950 ss 8 & 27 — Penal Code s 302

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E

Evidence — Information leading to fact discovered — Whether appellant's statement to police officer within ambit of s 27 of the Evidence Act 1950 — Evidence Act 1950 s 27

F

Evidence — Relevancy — Evidence of subsequent conduct — Whether subsequent conduct of appellant admissible — Evidence Act 1950 s 8

G

The appellant was convicted and sentenced to death by the trial court for the offence of murder under s 302 of the Penal Code. The deceased ('the deceased') in the present case was a toddler aged three years and three months at the time of his death. In prosecuting the appellant, the prosecution relied on the evidence of: (a) PW4 who saw the appellant and the deceased in a blue Atos car and about 30 minutes later, PW4 saw the appellant came back alone; (b) PW8, a police officer who recorded a statement by the appellant vide P73 in which the appellant stated that 'Tuan, saya boleh tunjuk di mana budak itu saya bawa dia pergi Kg Jempangah' ('the appellant's statement'); (c) the recovery police report ('P74'); (d) a doctor who conducted the post-mortem ('PW5') who testified that the bruises on the chest indicated that the deceased was gripped firmly and was held up with both hands; and (e) PW16 who performed a diatom test and confirmed in his findings that: (i) the deceased drowned in the exact location where the deceased was found; (ii) the cause of death of the deceased was drowning; and (iii) the DNA analysis on bloodstains found on the front passenger seat of the car matched the DNA of the deceased. In

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defence, the appellant called his wife ('DW2') who testified during examination in chief that the deceased came to her house to play with her son but during cross examination she changed her story and said the deceased did not come to her house so as to tally with the appellant's defence. In the present case, the issues raised were: (1) whether the prosecution had proven its case beyond reasonable doubt against the appellant on the murder charge by only adducing circumstantial evidence; (2) whether the appellant's statement to PW8 was within the ambit of s 27 of the Evidence Act 1950 ('the Act') and whether such statement was admissible; and (3) whether DW2's evidence was not credible and should be disregarded in its entirety.

Held, dismissing the appeal and affirming the conviction and sentence by the High Court:

(1) The finding of guilt by the trial judge was not based on the last seen theory alone but based on all the circumstantial evidence, inter alia: (a) the appellant was last seen with the deceased; (b) close proximity of place and time between the event the appellant having last seen with the deceased and the factum of death; (c) the bad family relationship between the appellant and the deceased's family as the motive which connected the appellant to the factum of murder; (d) the fact that the appellant had revealed to PW8 the whereabout of the deceased and the dead body of the deceased was recovered by the police based on the appellant's information; and (e) the blood stain in the appellant's car which contained the deceased's DNA. Based on the evidence, the court agreed with the learned judge that the appellant, who was last seen with the deceased, brought the deceased there, gripped the deceased by his chest threw him into the river and left him there to drown. For the above reasons, the learned trial judge had not committed any appealable error in dealing with the circumstantial evidence and made a correct conclusion that the available evidence could lead only to one irresistible conclusion that the appellant murdered the deceased. Therefore, the first ground raised by the appellant was without merit (see paras 42–43).

(2) Based on the learned trial judge's grounds of judgment, the court found that the learned trial judge was well appraised of the requirements of s 27 of the Act as well as s 8 of the Act and there was no reason to interfere with Her Ladyship's decision to admit P74 and P73. The appellant's statement as recorded in P73 was admissible under s 27 of the Act irrespective of whether it was voluntarily made and the subsequent conduct of the appellant in leading the police team members to a river in Kg Jempangah, Beaufort where the deceased was found was admissible under s 8 of the Act (see para 47).

(3) From the factual matrix of this case, the issue of whether the deceased came to DW2's house or otherwise was crucial and an important piece of

evidence because the appellant's narrative of the event was that he left the house at 6.40am without the deceased. The prosecution, through PW4 had established during its case that the appellant left in his car together with the deceased. The learned trial judge was correct in holding that DW2 was not a credible witness because her evidence was not consistent. As such, the third ground of appeal was also without merit. Based on the totality of the evidence, the surrounding circumstances and the probabilities of the case, the murder charge had been proven beyond reasonable doubt against the appellant (see paras 50–51).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dijatuhkan hukuman mati oleh mahkamah bicara atas kesalahan membunuh di bawah s 302 Kanun Keseksaan. Si mati ('si mati') dalam kes ini adalah seorang kanak-kanak kecil berusia tiga tahun dan tiga bulan pada masa kematiannya. Dalam mendakwa perayu, pihak pendakwaan bergantung kepada keterangan: (a) PW4 yang melihat perayu dan si mati di dalam kereta Atos berwarna biru dan kira-kira 30 minit kemudian, PW4 melihat perayu kembali bersendirian; (b) PW8, seorang pegawai polis yang merekodkan pernyataan oleh perayu melalui P73 di mana perayu menyatakan bahawa 'Tuan, saya boleh tunjuk di mana budak itu saya bawa dia pergi Kg Jempangah' ('pernyataan perayu'); (c) laporan polis berkenaan penemuan ('P74'); (d) doktor yang melakukan bedah siasat ('PW5') yang memberi keterangan bahawa lebam di dada menunjukkan bahawa si mati digenggam dengan kuat dan diangkat dengan kedua-dua tangan; dan (e) PW16 yang melakukan ujian diatom dan mengesahkan dalam penemuannya bahawa: (i) si mati lemas di lokasi yang sama di mana si mati ditemui; (ii) punca kematian si mati adalah lemas; dan (iii) analisis DNA ke atas kesan darah yang terdapat di tempat duduk penumpang depan kereta sepadan dengan DNA si mati. Sebagai pembelaan, perayu memanggil isterinya ('DW2') yang memberi keterangan semasa pemeriksaan utama bahawa si mati datang ke rumahnya untuk bermain dengan anaknya tetapi semasa pemeriksaan balas dia menukar ceritanya dan mengatakan si mati tidak datang ke rumahnya selari dengan pembelaan perayu. Dalam kes ini, isu-isu yang dibangkitkan adalah: (1) sama ada pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah terhadap perayu atas tuduhan membunuh dengan hanya bergantung kepada keterangan ikut keadaan; (2) sama ada pernyataan perayu kepada PW8 termasuk di bawah peruntukan s 27 Akta Keterangan 1950 ('Akta') dan sama ada pernyataan tersebut boleh diterima; dan (3) sama ada keterangan DW2 tidak boleh dipercayai dan harus diabaikan secara keseluruhan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi:

(1) Dapatan kebersalahan oleh hakim bicara bukan hanya berdasarkan teori terakhir yang dilihat semata-mata tetapi berdasarkan semua keterangan

yang ada, antara lain: (a) perayu terakhir kali dilihat bersama si mati; (b) jarak tempat dan masa yang dekat antara peristiwa perayu dilihat terakhir kalinya bersama dengan si mati dan fakta kematian; (c) hubungan keluarga yang buruk antara perayu dan keluarga si mati sebagai motif yang menghubungkan perayu dengan fakta pembunuhan; (d) hakikat bahawa perayu telah mendedahkan kepada PW8 keberadaan si mati dan mayat si mati telah ditemukan oleh polis berdasarkan maklumat perayu; dan (e) kesan darah di dalam kereta perayu yang mengandungi DNA si mati. Berdasarkan keterangan, mahkamah bersetuju dengan hakim yang bijaksana bahawa perayu, yang terakhir dilihat bersama si mati, membawa si mati ke tempat kejadian, mencengkam dada si mati, melemparkannya ke sungai dan meninggalkannya di sana sehingga lemas. Atas sebab-sebab di atas, hakim bicara yang bijaksana tidak melakukan kekhilafan yang boleh di rayu dalam menangani keterangan ikut keadaan dan membuat kesimpulan yang betul bahawa keterangan yang ada hanya boleh membawa kepada satu kesimpulan yang tidak dapat disangkal bahawa perayu membunuh si mati. Oleh itu, alasan pertama yang dikemukakan oleh perayu tidak bermerit (lihat perenggan 42–43).

(2) Berdasarkan alasan penghakiman hakim bicara yang bijaksana, mahkamah mendapati bahawa hakim bicara yang bijaksana telah menilai dengan baik mengenai syarat-syarat s 27 Akta dan juga s 8 Akta tersebut dan tidak ada alasan bagi mahkamah untuk mengganggu keputusan Yang Arif untuk menerima masuk P74 dan P73. Pernyataan perayu seperti yang tercatat dalam P73 boleh diterima di bawah s 27 Akta tanpa mengira sama ada ia dibuat secara sukarela dan tindakan perayu seterusnya yang membawa anggota pasukan polis ke sungai di Kg Jempangah, Beaufort di mana si mati ditemui boleh diterima di bawah s 8 Akta (lihat perenggan 47).

(3) Dari matriks fakta kes ini, persoalan sama ada si mati datang ke rumah DW2 atau sebaliknya adalah penting dan merupakan keterangan penting kerana naratif perayu mengenai peristiwa tersebut adalah bahawa dia meninggalkan rumah pada pukul 6.40 pagi tanpa si mati. Pihak pendakwaan, melalui PW4 telah membuktikan bahawa perayu telah meninggalkan keretanya bersama-sama dengan si mati. Hakim bicara yang bijaksana betul dalam memutuskan bahawa DW2 bukan saksi yang boleh dipercayai kerana keterangannya tidak konsisten. Oleh yang demikian, alasan rayuan ketiga juga tidak bermerit. Berdasarkan keseluruhan keterangan, keadaan persekitaran kes dan kebarangkalian kes tersebut, tuduhan pembunuhan telah dibuktikan melebihi keraguan yang munasabah terhadap perayu (lihat perenggan 50–51).]

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 273 (refd)
Kishore Chand v State of Himachal Pradesh AIR 1990 SC 2140 (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mirza Murtala v PP [2010] 5 MLJ 616, CA (refd)
Rishi Pal v State of Uttarakhannd 2013 (2) ACR 147 (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)

Legislation referred to

Evidence Act 1950 ss 8, 27
Penal Code ss 300, 302

Appeal from: Criminal Trial No BKI-45B-9/9 of 2015 (High Court, Kota Kinabalu)

Ram Singh (Kimberly Ye Wanchuin and Flavian Edward Henry with him) (Ram Singh & Co) for the appellant.
Nahra br Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabidin Diah JCA:

[1] Mohd Saifulrizan bin Sainan, the appellant in this appeal, was charged and tried in the High Court at Kota Kinabalu for murdering a toddler, Mohamad Syahriqal bin Sidek ('the deceased'). The charge reads:

> Bahawa kamu pada 21hb November 2014 jam lebih kurang 7:00 pagi, di sebatang anak sungai, di Kampong Jempangah, di dalam daerah Beaufort, dalam Negeri Sabah, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian seorang bernama Mohamad Syahriqal Bin Sidek KP No: 110807-12-2251, dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] At the end of the trial, the learned High Court judge ('learned trial judge') found the appellant guilty, convicted and sentenced him to death by hanging. Aggrieved by the said conviction and sentence, the appellant appealed to this court. We heard his appeal on 25 November 2019, at the end of which, we unanimously found his appeal was without merit. We dismissed his appeal and maintained the finding of the learned trial judge. Now we are giving our reasons for dismissing the appellant's appeal.

A THE PROSECUTION'S CASE

[3] In essence, the case for the prosecution as narrated by the learned trial judge was that the deceased was a toddler three years and three months at the time of his death. He was the son of the PW3 (mother) and PW6 (father).
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[4] On the 21 November 2014, PW3 woke up from her sleep and noticed that her son was missing. She went to search for her son around the neighborhood and was informed by a relative of hers that she saw the deceased playing with the appellant. Immediately she went to approach the appellant's C wife. However, the appellant's wife told PW3 that her son had gone back home.

[5] Kalmani bin Kalang (PW4) is the nephew of the appellant. On the fateful day itself at about 7am, he saw the appellant and the deceased in a blue D Atos car. There were only two of them in the car and PW4 saw the appellant carry the deceased from the front seat and put him in the back seat. About 30 minutes later, PW4 saw the appellant come back alone.

[6] When PW3 went searching for her son together with fellow villagers, E PW4 then told PW3 of this information. PW3 then lodged a police report (exh P59) and immediately a wide scale search was launched.

[7] Inspector Mat Nor bin Lamit (PW14), the investigating officer for this F case had launched a search operation at Kg Salagon Beaufort on the 21 November 2014 but the deceased was not found.

[8] On the 22 of November 2014, ASP Akhiruddin bin Nowani (PW9) formed a search and rescue team consisting of Bomba, K9 Unit, JPAM and police. The search area was extended to 800m radius. However, the rescue G search was not fruitful in finding the deceased.

[9] On the 23 of November 2014, PW9 decided to extend the search to 1,200m radius. At 11am, PW9 conducted an interview with PW4 and based on this information, PW9 instructed Insp Muhamad Zulhalie Yahya (PW8) to H arrest the appellant.

[10] PW8, his team and the appellant went to a river near Kg Jempangah Beaufort. The appellant then led the police team to a stream at the side of the I road leading to Kg Jempangah as per exh P71. The deceased was found dead in the stream, 8km from his home.

[11] A post mortem was conducted by Dr Jessie Hui (PW5) and she found bruises on the back of the head, on the left cheek and chest and that the bruises

occurred before death. PW5 noted that the bruises on the chest indicated that the deceased was gripped firmly and was held up with both hands.

[12] A diatom test was also performed by Chong Sing Leng (PW16) and PW16 confirmed in his findings that the deceased drowned in the exact location where the deceased was found. The cause of death of the deceased was drowning (exh P62). The DNA analysis on bloodstains found on the front passenger seat (exh P52) matched the DNA profile developed from the bone specimen taken from the deceased (exh P8).

FINDING OF THE TRIAL JUDGE

[13] At the end of the prosecution's case, the learned trial judge found that Mohamad Syahriqal bin Sidek, is dead. The cause of death was drowning. Based on the totality of the evidence before the court, the learned trial judge found the drowning was caused by the appellant with the intention of causing the death of the deceased. Thus, the learned trial judge found a prima facie case had been made out for the charge of murder and ordered the appellant to enter his defence.

DEFENCE

[14] The appellant gave evidence on oath and called his wife to give evidence as DW2. The defence of the appellant was simply that he was not involved in the disappearance of the child.

[15] The appellant testified that he left his house at 6.45am in the morning to meet a friend at KM2 Pembekal Papan. He then received a phone call from his wife saying that the deceased was missing and immediately went back home.

[16] Upon reaching home, all neighbours were searching for the missing child. He enquired from the brother of the deceased as to the whereabouts of the deceased. The brother informed him that the deceased was seen running from the front of the appellant's house to the store.

[17] The appellant also testified that he had asked PW4 on whether PW4 had seen the deceased but PW4 said he had not. This was apparently done in full view of PW3 (the deceased's mother).

[18] The appellant also testified that the police and the K9 Unit had checked his Atoz car but found nothing and the appellant himself offered for his Wira car to be similarly examined but the police declined. The appellant also informed the court of the existence of one white Viva car on that morning and

that on 22 November 2014 the owner of Viva car washed and polished the entire car.

[19] The appellant further testified that on 23 November 2014, the police came to his house and requested him to come down to the police station which he did and he was asked about the child. The appellant testified that he told the police he did not know the child's whereabouts and was beaten by the police on the head using a spike bush shoe with iron buckle on it.

[20] The appellant's explanation on the bloodstains and the DNA of the deceased in his car is simply that the deceased had played with the appellant's son in the car, and the bloodstains were from the scabies that the deceased had.

[21] The appellant called his wife to give evidence as DW2. DW2's evidence was that she too saw the deceased following his elder brothers to DW2's house to play with the DW2's (and the appellant's) son. Her testimony was that she saw the appellant leaving the house using the Atoz car but there was no one with the appellant.

FINDING OF THE TRIAL JUDGE

[22] At the conclusion of the trial, the learned trial judge found the appellant's defence had failed to raise reasonable doubt against the prosecution's case. The prosecution on the other hand had proven its case beyond reasonable doubt against the appellant on the murder charge under s 302 of the Penal Code. Hence the appellant was sentenced to death by hanging.

APPEAL

[23] The appellant listed eight grounds of appeal in his petition of appeal. However, some of the grounds are inter-related. Thus, before us, the learned counsel for the appellant summarised the grounds into three main grounds as follows:

(a) whether the prosecution had proven its case beyond reasonable doubt against the appellant on the murder charge by only adducing circumstantial evidence;

(b) whether the appellant's statement to PW8, 'Tuan, saya boleh tunjuk di mana budak itu saya bawa dia pergi Kg Jempangah', is within the ambit of s 27 of the Evidence Act 1950 and whether such statement is admissible; and

(c) whether DW2's evidence was not credible and should be disregarded in its entirety.

[24] Regarding the first ground, it is the appellant's case that the circumstantial evidence relied on by the prosecution has not been satisfactorily established against the appellant and does not provide a complete chain to bring home the guilty verdict against the appellant. The last seen theory could not be used to prove every essential ingredients of the murder charge. Therefore, it was further submitted by counsel for the appellant, the learned trial judge had erred in law and in fact to call for the defence when there was no cogent evidence to support Her Ladyship's finding as to mens rea of murder. It was a misdirection on the part of the learned trial judge to draw adverse inference of guilt against the appellant from the fact the appellant was last seen with the deceased.

[25] In response, the learned DPP submitted that the evidence produced by the prosecution shows that there is only one conclusion that could be derived and that is the appellant was the person who committed the murder of the deceased. The case for prosecution did not rely solely on last seen theory but based on circumstantial evidence when considered together, point only to the guilt of the appellant.

[26] Regarding the seecond ground, the learned counsel for the appellant claimed that P73 on which PW8 recorded 'Tuan, saya boleh tunjuk di mana budak itu saya bawa dia pergi Kg Jempangah' purportedly given by appellant and the recovery police report (P74) were fabricated. Even if the information was given by the appellant, it is not admissible because the information did not lead to discovery and was not voluntarily made. Learned counsel further submitted that that the learned trial judge had erred when Her Ladyship relied on P73 which had no other details to prove that the appellant threw the deceased into the river.

[27] In response, the learned DPP submitted, amongst others, there is no evidence to show that PW8, Sargent Ravendran and Lance Corporal Nazrie had already discovered the deceased's body when the appellant gave the information under s 27. What the counsel refers in P74 did not show that PW8, Sargent Ravendran and Lance Corporal had prior knowledge where the deceased body was. No plausible reason was shown why the police would playact the discovery under s 27 if they knew all along the whereabouts of deceased's body. There is no reason to doubt the credibility and reliability of PW8. The learned trial judge emphasised that PW8, the arresting officer in this case, testified under oath that the appellant had revealed to him the whereabouts of the deceased.

[28] The third ground raised was with regards to the failure by the learned trial judge to take into account the evidence of DW2 who testified that she could clearly see the inside of the car through its open door while she was in the

kitchen and she did not see anyone inside the car.

[29] In response, the learned DPP submitted that DW2's evidence as to whether the deceased came to her house or otherwise is material because the appellant's narrative was that he had left his house at 6.45am alone. During examination-in-chief, DW2 said the deceased came to her house to play with her son but during cross-examination she changed her story and said the deceased did not come to her house so as to tally with the appellant's defence. As such, it was submitted by learned DPP, the learned trial judge was correct when Her Ladyship held that DW2 was not a credible witness because DW2's evidence was inconsistent.

FINDINGS OF THIS COURT

[30] In this case, there is no dispute that the case for the prosecution is essentially based on circumstantial evidence. The law on circumstantial evidence is well settled. There are plethora of cases decided by the apex court that laid down guidelines for appreciation of evidence in cases of this nature. One such case was *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 where Syed Othman FJ (as he then was) had the following to say of a judge dealing with circumstantial evidence. At p 280 of the report His Lordship opined:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v Director of Public Prosecutions* where it was argued, at p 279, before the House of Lords that 'in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are: (a) consistent with the guilt of the accused; and (b) exclude every reasonable explanation other than the guilt of the accused

[31] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, the Federal Court had stated that:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306, 310).

[32] Reverting to this appeal, the prosecution's case is essentially resting on circumstantial evidence. The question, therefore, is whether the prosecution had proven the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. The circumstances must be satisfactorily established and the proved circumstances must bring home the offence to the appellant beyond all reasonable doubt. There must be a chain of evidence which is consistent and complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the appellant and it must be such as to show that within all probability the act must have been done by the appellant and the appellant alone (see *Kishore Chand v State of Himachal Pradesh* AIR 1990 SC 2140 which was cited with approval by this court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805.

[33] The appellant in this case was charged for murder. To prove a case of murder, the prosecution need to prove the following:

(a) the death of Mohamad Syahriqal bin Sidek (the deceased);

(b) the deceased suffered injuries that resulted in his death;

(c) that the injuries were caused by the appellant; and

(d) the act by the appellant comes within the ambit of one or a combination of the limbs under s 300 of the PC.

[34] The death of the deceased is not in dispute. This has been established from the evidence of the pathologist, Dr Jessie Hiu (PW5) and the deceased's mother (PW3). The cause of death was drowning. PW5 also testified that looking from the decomposition process, the deceased was probably in the water 3–5 days before being found. In any event the fact that the deceased is dead and the cause of death was drowning were not seriously disputed and we agree with the learned DPP who submitted that it needs no imagination to conclude that an act of drowning, especially on a child of tender age, would in all probability cause death, or such bodily injury as is likely to cause death.

[35] The only element left to be proven is that the appellant was the one who drowned the deceased and caused the deceased's death. As alluded to earlier, there was no witness who saw the deceased being drowned by the appellant. The prosecution had to rely on circumstantial evidence to prove its case and the learned trial judge was well appraised of this fact. Her Ladyship examined all the established circumstances, made finding of facts and found the established facts to be consistent with the hypothesis of guilt and the chain of evidence was complete, that it excludes any conclusion of the appellant's innocent. And we

find no reason to disagree with the learned trial judge's finding for the following reasons.

[36] Based on the evidence of PW5, which the learned trial judge had accepted, the deceased was found to have suffered bruises on the back of the head, on the left cheek and chest. The bruises occurred before the death and the bruises on the chest indicate that the deceased was gripped firmly and was held up with both hands.

[37] The evidence given by PW16 who conducted the diatom test, which again was accepted by the learned trial judge, confirmed the deceased died of drowning. The exact location where the deceased drowned was the exact location where the deceased was found. It was 8km away from the deceased home.

[38] Based on PW4's evidence, it was established that PW4 saw the appellant with the deceased on the very morning of the deceased's disappearance. She saw the appellant took the deceased from the front seat and put him on the back seat of the blue Atoz car. PW4 then saw the appellant driving away with the deceased in the car. The blue Atoz car was registered in the appellant's name and was subsequently seized from the appellant's home and samples were taken from the car for DNA analysis. DNA analysis by PW1 found the DNA of the deceased in the blood sample taken from the seat of the Atoz car.

[39] The spot where the deceased was found is 8km away from the deceased home and approximately 15 minutes by car as testified by PW14. This is consistent with the evidence of PW4 who saw the appellant driving away with the deceased and returning 30 minutes later.

[40] The deceased was found 8km away from his home. Looking at the photographs tendered, it is clear that the area from which the deceased was found is quite secluded. We agree with the learned trial judge's observation that obviously a child of that age won't be roaming around that far unless someone brought him there. All the evidence led to only one conclusion and that is the appellant, who was the last person seen with the deceased, was the one who brought the deceased to the place where the deceased was later found.

[41] We are aware that the fact the appellant was the last seen with the deceased by itself may not be enough to prove a case beyond reasonable doubt, but in this case, it is pertinent to note, PW4 saw the appellant putting the deceased in his car at about 7am. There were only two of them in the car. Both left and about 30 minutes later, PW4 saw the appellant coming back alone. The spot where the deceased was found is 8km away from the deceased home and

approximately 15 minutes by car as testified by PW14. Therefore on of account of the close proximity of place and time between the event the appellant having last seen with the deceased and the factum of death, it is reasonable to conclude that either the appellant should explain how and in what circumstances the deceased suffered the death or should own the liability for the homicide. The Supreme Court of India in *Rishi Pal v State of Uttarakhannd* 2013 (2) ACR 147, had this to say regarding the principle of last seen evidence:

> 16. In *Mohibur Rahman and Anr v State of Assam* (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused *should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide*. Similarly in *Arjun Marik and Ors v State of Bihar* 1994 Supp (2) SCC 372, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded.

[42] In this case, the prosecution's case was not entirely based on the last seen theory. The finding of guilt made by the trial judge was also not relied on the last seen theory alone, but based on all the circumstantial evidence produced which when taken together would only point to the guilt of the appellant. Other than the fact that the appellant was last seen with the deceased, supported with an account of close proximity of place and time between the event the appellant having last seen with the deceased and the factum of death, learned trial judge also took into account the bad family relationship between the appellant and the deceased's family as the motive which connects the appellant to the factum of murder. The fact that the appellant had revealed to PW8 the whereabout of the deceased and the dead body of the deceased was recovered by the police based on the appellant's information, the blood stain in the appellant's car which contained the deceased DNA were also taken into account. Based on all these evidence, we find no reason to disagree with the learned trial judge's conclusion that it is safe to conclude that the appellant, who was last seen with the deceased, brought the deceased there, gripped the deceased by his chest (based on PW5's evidence that the deceased chest was gripped) threw him into the river and left him there to drown.

[43] For the above said reasons, we find the learned trial judge had not committed any appealable error in dealing with the circumstantial evidence before her and made a correct conclusion that the available evidence could lead to only one irresistible conclusion and that conclusion is that it was the appellant who had committed the murder of the deceased. Therefore the first

ground raised by appellant is without merit.

[44] Regarding the second issue, it was submitted by learned counsel for the appellant that it was wrong for the learned trial judge to rely on P73 and P74 because they were fabricated by PW8 and the statement therein if was indeed given by the appellant, it was not done voluntarily. Further the statement did not say the appellant threw the deceased or drowned the deceased in the river.

[45] Going through the notes of proceeding, we find there is nothing in evidence to suggest that P73 was fabricated. The issue of P73 being fabricated was only raised by learned counsel during cross-examination by merely putting to PW8 that PW8 had fabricated P73. There was no evidence to support what was put to PW8. It is trite that what is being put to prosecution's witness during prosecution's stage by the defence is not evidence. It is just a proposition which remains to be proven (*Mirza Murtala v Public Prosecutor* [2010] 5 MLJ 616 at p 625). Hence we are of the view that the allegation of P73 being fabricated as was put to PW8 was just a proposition unsupported by evidence and successfully refuted by the prosecution.

[46] On issue of voluntariness, it is clear to us that the learned trial judge relied on s 27 of the Evidence Act 1950 ('the Act') to admit P73. Learned trial judge wrote in her ground:

> The defence claimed that P73 was a fabricated piece of evidence which does not come under the ambit of s 27 of the Evidence Act. The defence also claimed that P73 only stated that the accused will point to where he took the child to Kg Jempangah and not where he threw or drown the child into the small river.
>
> It is a fact that no one saw the incident. However PW8 who is the arresting officer in this case testified under oath that the accused had revealed to PW8 the where about of the deceased (P73). The body was discovered by the police based on the accused's information. If this information was not given by the accused, the police will not know the location of the child (bear in mind the SAR took 3 days to no avail). The dead body was found at a small river in Kg Jampangah, Beaufort. PW8 had lodged a report under s 27 Evidence Act (P74) and discovery report 3 (P73).
>
> In this case, the accused was arrested based on information that he was the last to be seen with the deceased. The accused was interrogated to get some information and the accused had revealed some information to the police. The information which led the police to discover the deceased is relevant to show his conduct under s 8 of the Evidence Act.

[47] Going through the grounds, particularly the above quoted passages, we find the learned trial judge was well appraised of the requirements of s 27 of the Act as well as s 8 of the Act and we find no reason to interfere with Her Ladyship's decision to admit P74 and P73. The appellant's statement as recorded in P73 is admissible under s 27 irrespective of whether it was

voluntarily made and the subsequent conduct of the Appellant in leading the police team members to a river in Kg Jempangah, Beaufort where the deceased was found is admissible under s 8 of the Act of the Act. In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 at p 646; [2013] 4 CLJ 149 at p 167, the Federal Court had said:

> [28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information.

[48] The third ground of appeal relates to failure of the learned trial judge to accept the evidence of DW2 who testified that she could see the appellant's car doors opened, could clearly see inside the car and she did not see anyone inside the car but Her Ladyship instead accept the evidence of PW4 who said he saw the deceased in the appellant's car.

[49] Going through the ground of judgment, it is clear that the learned trial judge had analysed DW2's evidence in light of other available evidence. The learned trial judge found DW2's evidence not only contradictory to the other available evidence but DW2 also kept changing her position on the most crucial aspect of appellant's defence. Thus, the learned trial judge came to the conclusion that DW2 was not a credible witness. The learned trial judge wrote as follows in her judgment:

> PW4 is the accused's wife's brother. His evidence is very important as he is giving evidence against his own family member. PW4's house is right in front of the accused's house. On that day, PW4 saw the accused removed the deceased in his car in front of their house while he was on his way to go to the back of accused's house. However, the accused and his wife said the car was parked at the back of his house near the kitchen. Not only that, DW2's story was also not credible because at first she testified that the deceased came to her house that morning [NOP 233 para 4730] and later when asked again, she said she did not see the deceased [NOP 232 para 4922–4928]. Also when deceased's mother went to see DW2, she said the deceased had gone back. She never said these during examination in chief [NOP 235 para 4986-4997]. If DW2 is not credible, then DW1's story has less weight and merely to justify of what was raised during prosecution stage thus incapable of raising doubt to the prosecution's case.

[50] From the factual matrix of this case, we are of the view, whether the deceased came to DW2's house or otherwise is crucial and an important piece of evidence because the appellant's narrative of the event is that he left the house at 6.40am in the morning without the deceased. The prosecution, through PW14 had established during its case that the appellant left in his car together

with the deceased. When DW2 kept changing her position as to whether the deceased did come to her house or not on that day, we are of the considered view that the learned trial judge was not wrong in holding that DW2 was not a credible witness because her evidence was not consistent. As such, we find the third ground of appeal is also without merit.

CONCLUSION

[51] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our finding that the murder charge had been proven beyond reasonable doubt against the appellant.

[52] For the above said reasons, we hold that there is no merit in this appeal. The conviction is safe and amply supported by the evidence on record. Therefore, the appellant's appeal is dismissed. The conviction and sentence of the High Court is affirmed.

Appeal dismissed; conviction and sentence by High Court affirmed.

Reported by Dzulqarnain Ab Fatar